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No.

OFFICE OF THE CLERK

In The

Supreme Court of the United States

NELSON and JOAN FERNANDES

Petitioner(s),

v.

SPARTA TOWNSHIP.

On Petition for Writ of Certiorari
To The Supreme Court of New Jersey

PETITION FOR WRIT OF CERTIORARI

Nelson Fernandes – Pro se
9 Fox Run
Denville, N.J. 07834
(973) 627 –2138

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40 pp

Questions Presented for Review

This question refers in part to the Younger doctrine.

1. Is there bad faith or unusual circumstances to warrant this Court's interference and was petitioner deprived of his right to "challenge interlocutory orders of serious, perhaps irreparable, consequence".

The next two questions refers to stare decisis

2. Does special justification exist to warrant the N.J. Supreme Court's departure from uninterrupted proceedings.

3. Should the Supreme Court adhere to *Panitch's* adoption of *Liteky* and *Alexander* on disqualification issues as an inferior court and can petitioner rely on their holdings.

4. Is the N.J. Supreme Court's refusal to apply *Panitch* and its holdings fundamentally unfair.

5. Does denying a recusal motion threaten a constitutional right and does it require an appeal as of right.

6. Does the right to disqualify a judge apply to civil & criminal cases and should appeal of it be pre or post trial.

7. Should N.J. provide an appeal as of right on denied recusal motions to be equal to a litigant's right to prohibition and mandamus as provided by Circuit Courts and numerous other states without the need for leave.

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B- 11/04/02 Appellate Division Order Denying Leave

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D - 08/14/02 Tax Court Order Denying Reconsideration

E - 07/30/02 Tax Court Order Transferring Jurisdiction

F - 09/03/02 Judge's Opinion on Recusal Motion

G - 07/16/02 Judge's Opinion on First Motion

H - 08/02/02 Judge's Opinion on Reconsideration

I - 07/03/02 Sparta's First Reply Brief

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(This brief is not allowed by *R.* 1:6-3(a).[A] Leave was not requested. A cross-motion was not filed. So, the court usurped it authority by considering it and ruling on it.)

AA - P. 16 of Petitioner's brief to the N.J. Supreme Court

AB - P. 17 of Petitioner's brief to the N.J. Supreme Court

AC - P. 14 of Petitioner's brief to the N.J. Supreme Court

AD - P. 7 of Respondent's brief to the N.J. Supreme Court

[A] *R.* 1:6-3(a). Reply papers responding to opposing affidavits or certifications shall be filed and served not later than 4 days before the return date unless the court otherwise orders. . . No other papers may be filed without leave of court.

Statement on the Orders Entered

Five orders and three opinions were entered;

Tax Court order & opinion denying various relief;

Tax Court order & opinion denying reconsideration;

Tax Court order & opinion denying disqualification motion;

Appellate Division Order denying Leave to Appeal;

Supreme Court Order denying Leave to Appeal.

Statement of the Basis for Jurisdiction

Petitioner seeks a review of the N.J. Supreme Court's 1/15/03 order denying leave to appeal a denied recusal motion & stay pursuant to 28 USC 1257, 2101, 2104 & 2106."Bad faith . . unusual circumstances . . call for equitable relief" in this pending civil action. *Younger v. Harris*, 401 at 54.

Statement of the Case

At the onset, petitioner moved for relief before the Tax Court. The attorney for Sparta filed his reply (Pa. I) then filed a second reply (Pa. J), which is not allowed without leave, not asked for or granted. *R.* 1:6-3(a). That brief raised an issue of jurisdiction without a cross-motion. The judge, who "will be deciding" the substantive issues at trial aligned himself with Sparta[1] and usurped his authority by deciding an issue based on a

[1] "Judge's participation in a case must never reach the point where it appears. . . that the Judge is aligned with any party in the

brief that is barred. *R.*1:6-3(a). The judge (Pa.G **Bold**) treated the complaint, as a small claim, to avoid requiring an answer then finds its not a small claim to allow certain discovery and to increase the filing fee. His arbitrary reversal without adjustment in the same opinion indicates bias. For the sake of brevity, petitioner will not address the other issues that warrant recusal.

Petitioner filed a motion to reconsider the interlocutory order on the grounds that he was denied notice and the opportunity to be heard. It was denied based on Sparta citing a *Court Rule* on final orders, which was frivolous.

Petitioner moved to disqualify the judge on the grounds that his denial of due process was a blatant error that proved bias[2] and moved to disqualify the attorney for creating an appearance of impropriety. That motion was denied.

Petitioner sought leave to appeal the denial in the appellate division, which was denied. Then sought leave to appeal the denial of leave to appeal the disqualification motion in the N.J. Supreme Court, which was denied. The Court's denial involves bad faith and/or unusual circumstances.

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pending litigation. *Alexander v. Primerica Holdings, Inc.*, 10 F.3d 155, 162 (3d Cir. 1993).

[2] "An error might be sufficiently blatant, and so lacking in an alternative, good faith explanation that the error would support a charge of bias. *State v. Marshall*, 148 N.J. 89 (1997).

The N.J. Supreme Court denied leave based on respondent's argument that N.J.'s judicial policy is an "uninterrupted proceeding at the trial level with a single and complete review" as it appears on page 7 of their brief (Pa. AD), though the judge clearly denied petitioner due process. Conversely, petitioner's brief quoted the law of *Kugler* on p. 17, [52] (Pa. AB). And quoted *Panitch* as having accepted *Liteky* on appeals and *Alexander* on facing a biased judge, p. 14 (Pa. AC), and as allowing interlocutory appeals, p. 16 (Pa. AA).

Hence, the N.J. Supreme Court denied leave by accepting respondent's argument for an uninterrupted trial over an appeal to address the trial judge's obduracy, by refusing to acknowledge a predisposition that appears in the record. The Supreme Court's refusal to apply *Panitch,* and to disregard *Liteky* and *Alexander* was fundamentally unfair. *In Re Winship,* 397 U.S. 358 (1970).

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[52] "The right to a fair trial would be protected by the New Jersey rule that **permits a defendant to disqualify a particular judge from participating in his case.** See New Jersey Court Rules 1:12-1 to 1:12-3 . . disqualification is mandatory whenever there is any reason "which might preclude a fair and unbiased hearing and judgment, or which might reasonably lead counsel or the parties to believe so." Rules 1:12-1 (e) and (f). . **If, because of such disqualifications, the Supreme Court were deprived of the requisite five-member quorum, temporary assignment of substitute Justices is authorized by the New Jersey Court Rules. Rule 2:13-2.** *Kugler v. Helfant*, 421 U.S. 117 (1975).

I - Reasons for Granting this Petition

The Supreme Court of New Jersey decided an important question of federal law in a way that conflicts with *Kugler* (1975), *Liteky* (1994), *Adarand* (1995), *Gardner* (1978), *North.* (1976). & *Alexander* (3d Cir. 1993). *Kugler* recognized that N.J. allows a defendant to disqualify a judge "from participating in his case" pursuant to *Court Rules* 1:12-1 to 1:12-3. These rules of general application apply to civil and criminal cases (*R.*1:1-1). *Kugler* recognized the right to disqualify a judge before trial;

> "If, because of such disqualifications, the Supreme Court were deprived of the requisite five member quorum, temporary assignment of substitute Justices is authorized by N.J. Court Rules."

Panitch accepted *Liteky* as implicitly requiring an appeal before trial, not a new trial, if recusal is denied,[3] and accepted *Alexander* as not having to face a biased judge. So, *Panitch* implicitly accepted *Alexander* on the "propriety of interlocutory review of disqualification issues". Therefore, denying leave involves bad faith and unusual circumstances.

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[3] **"[I]f through obduracy, honest mistake, or simple inability to attain self knowledge the judge fails to acknowledge a disqualifying predisposition or circumstance, an appellate court must order recusal no matter what the source."** Liteky v. U.S., 510 U.S. 540, 563 "Litigants ought not have to face a judge where there is reasonable question of impartiality..." Alexander v. Primerica Holdings, Inc., 10 F.3d 155, 162 (3d Cir. 1993)." *Panitch v. Panitch*, 339 N.J.Super. 63 (A.D.2001).

Kugler was based on *R.*1:12-1 to 1:12-3 permitting a judge's disqualification. *R.*1:12-2 [4] implicitly guarantees a right to appeal before trial else obduracy (*Liteky*) could render it moot. That right[5] is subject to due process protection.[6] However, the N.J. Supreme Court changed its policy to an "uninterrupted proceeding at the trial level with a single and complete review" and considers interlocutory appeals as "highly discretionary".[7] This change has resulted in the state remedy becoming inadequate, which should prompt this Court to provide equitable

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[4] "1:12-2. Disqualification on Party's Motion
Any party, on motion made to the judge before trial or argument and stating the reasons therefor, may seek that judge's disqualification."

[5] "Black's defines "right" as "[t]hat which is proper under law"; "[s]omething that is due to a person by just claim"; "[a] power, privilege, or immunity secured to a person by law."" *Bradbury v. State*, 2002 UT App 417 (2002).

[6] "The Supreme Court has found that the Due Process clause protects the right to direct appeal when that right is guaranteed by the state, even though the Constitution does not require states to grant that right. See, e.g., Evitts, 469 U.S. at 393. Due process requires that a right to appeal be a right to an "'adequate and effective' appeal" which is "more than a 'meaningless ritual.'" . . . Due process further protects not only the right "to obtain a favorable decision," but also the right "to obtain a decision at all . . . on the merits of the case." Evitts, 469 U.S. at 395 n.6." *Burkett v. Cunningham*, 826 F.2d 1208 (3rd Cir. 1987).

[7] "Interlocutory appellate review runs counter to a judicial policy that favors an "uninterrupted proceeding at the trial level with a single and complete review." . . Moreover, the grant of leave to appeal an interlocutory order is itself highly discretionary." *State v. Reldan*, 100 N.J. 187 (N.J. 1985).

relief.[8] Disqualifying a biased judge at this juncture is fairer then reversing the trial.[9] Moreover, an 'exception' to the rule on uninterrupted trials exists to challenge interlocutory orders.[10]

The N.J. Supreme Court abandoned its policy in *Kugler* without "special justification".[11] Then refused to enforce *Panitch*

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[8] "The major premise underlying the Court's holding in Younger v. Harris, 401 U.S. 37, is that a court of equity should not act when the moving party has an adequate remedy at law. . . A court of equity may have a duty to act if the alternative legal remedy is inadequate. " *Juidice et al. v. Vail et al.*, 430 U.S. 327 (1977).

[9] "We have found an error to be "structural," and thus subject to automatic reversal, only in a "very limited class of cases." . . . Tumey v. Ohio, 273 U. S. 510 (1927) (biased trial Judge)." *Neder v. U.S.*, 527 U.S. 1, (1999).

[10] "§ 1292 (a)(1) . . creates **an exception from the long-established policy against piecemeal appeals, which this Court is not authorized to enlarge or extend. The exception is a narrow one and is keyed to the "need to permit litigants to effectually challenge interlocutory orders of serious, perhaps irreparable, consequence."** Id., at 181." *Gardner v. Westinghouse*, 437 U.S. 478 (1978).

[11] "Although adherence to precedent is not rigidly required in constitutional cases, any departure from the doctrine of stare decisis demands special justification." . . In deciding whether this case presents such justification, we recall Justice Frankfurter's admonition that "stare decisis is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience." . . Remaining true to an "intrinsically sounder" doctrine established in prior cases better serves the values of stare decisis than would following a more recently decided case inconsistent with the decisions that came before it; the latter course would simply compound the recent

by not providing the interlocutory appeal that is implicit in it acceptance of *Alexander,*[12] which is fundamentally unfair.[13] After which, it denied petitioner leave to appeal in favor of "a single and complete review." So this state remedy is inadequate compared to a writ of prohibition or mandamus that goes to the merits, as allowed by every circuit and numerous state courts.[14]

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error and would likely make the unjustified break from previously established doctrine complete. **In such a situation, "special justification" exists to depart from the recently decided case.** *Adarand. v. Pena,* 115 S.Ct. 2097 (1995).

[12] "Because public confidence in the judicial system mandates, at a minimum, the appearance of neutrality and impartiality in the administration of Justice, we will issue a writ of mandamus . . . . **Litigants ought not have to face a Judge where there is a reasonable question of impartiality . . . . Virtually every court of appeals has recognized the necessity and propriety of interlocutory review of disqualification issues on petitions for mandamus** . . . We cannot overlook the fact that this is a non-jury case, and that Judge . . will be deciding each and every substantive issue at trial." *Alexander v. Primerica Holdings, Inc.*, 10 F.3d 155, 162 (3d Cir. 1993).

[13] "". . no change in ancient procedure can be made which disregards those fundamental principles, to be ascertained from time to time by judicial action, which have relation to process of law and protect the citizen in his private right, and guard him against the arbitrary action of government." . . . In those words is found the kernel of the "natural law due process" notion by which this Court frees itself. .to declare any law unconstitutional that "shocks its conscience," deprives a person of "fundamental fairness," or violates the principles "implicit in the concept of ordered liberty."" *In Re Winship*, 397 U.S. 358 (1970).

[14] *Ex parte City of Dothan Personnel Bd.*, No. 1001978 (Ala.Sup.Ct.2002); *Boswell, Tucker & Brewster v. Shirron*, 921 S.W.2d 580 (Ark.Sup.Ct.1996); *Goebel v. Benton*, 830 P.2d 995

The fact that the judge denied the recusal motion means petitioner's constitutional right to an impartial judge [15] in the first instance [16] was threatened before he moved for leave.[17] So, the denial of leave in favor of "a single and complete review" failed to provide an appeal for a threatened irreparable injury *R.* 2:2-2(b).[18] Hence, petitioner is proceeding to trial in the first instance

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(Co.Sup.Ct.1992); *Monroe W. Scott v. U.S.*, 536 A.2d 1040, fn.5 (Ct.App.D.C. 1987); *Shuler v. Green Mtn. Ventures, Inc.*, 791 So.2d 1213 (Fla.App.Dist.5 2001); *Greg H. Bower v. Hon. Thomas R.*, 880 P.2d 245 (Id.Sup.Ct.1994); *Doering v. Fader*, 316 Md. 351, 558 A.2d 733 (Md.App.1989); *Missouri v. Hon. J. Goeke*, 794 S.W.2d 692 (Mo.Ct.App.1990); *City of Las Vegas v. Eighth Judicial Dist. Court*, 5 P.3d 1059 (Nev. 2000); *State ex rel Kreps v. Christiansen*, 88 Ohio St.3d 313 (Ohio 2000); *Pierce v. Pierce*, 2001 OK 97 (Ok.Sup.Ct. 2001); *In re Hon. R. D. Schenck*, 318 Or. 402, 870 P.2d 185 (Or. 1994); *Municipal Publications v. Judge B. Snyder*, 322 Pa. Super. 464, 487-88 (1983); *Monroe v. Blackmon*, No. 13-96-642-CV (Tex.App. Dist.13 1997); *Stern Bros. v. Hon. J.G. McClure*, 236 S.E.2d 222 (W.Va.Sup.Ct.1977).

[15] "An impartial Judge is a basic due process requirement." Alexander v. Primerica Hldg., Inc., 10 F.3d 155 (3d Cir. 1993).

[16] "In Ward v. Village of Monroeville, 409 U.S. 57, the Court made clear that "the State's trial court procedure [cannot] be deemed constitutionally acceptable simply because the State eventually offers a defendant an impartial adjudication. Petitioner is entitled to a neutral and detached judge in the first instance."" *North v. Russell,* 427 U.S. 328 (1976).

[17] "Interests were either threatened or in fact being impaired at the time relief was sought . . constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347 (1976).

[18] "New Jersey court rules explicitly permit a litigant to seek leave to appeal to its Supreme Court from an interlocutory order

before a judge he believes to be biased, which conflicts with *North v. Russell,* because the Supreme Court refuses to address the threatened irreparable injury. So, the Supreme Court's exercise of discretion renders its legal remedy inadequate.[19] Its exercise of discretion "illustrates the potential for future mischief that the error entails".[20] So, "there exists some cognizable danger of recurrent violation" of petitioner's "legal rights."[21] The recurrent violation would be the trial before the biased judge since petitioner was denied an impartial judge in the first instance and the potential for institutional bias against retrial. [22]

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of the Appellate Division, "when necessary to prevent irreparable injury." New Jersey Court Rule 2:2-2(b)." *N.J. v. Chesimard*, 555 F.2d 63 (3rd Cir. 1977).

[19] "Threat of irreparable injury for which there is no adequate legal remedy." *Laing v. U.S.*, 423 U.S. 161 (1976); *Sampson v. Murray*, 415 U.S. 61 (1974).

[20] **"Repeated mistake does not transform error into truth, but illustrates the potential for future mischief that the error entails."** *Dickerson v. U.S.*, No. 99-5525 (U.S. 2000).

[21] **"There exists some cognizable danger of recurrent violation" of its legal rights."** *U.S. v. W.T. Grant Co., 345 U.S. 629, 633 (1953)*; *City of L.A. v. Lyons*, 461 U.S. 95, 111 (1983).

[22] "The decisions in these cases reflect a recognition by the Court of the institutional bias inherent in the judicial system against the retrial of issues that have already been decided. The doctrines of stare decisis, res judicata, the law of the case, and double jeopardy all are based, at least in part, on **that deep-seated bias . . the same institutional pressure that supports them might also subconsciously motivate a . . judicial response to a defendant's exercise of his right to obtain a retrial of a decided question.** *U.S. v. Goodwin*, 457 U.S. 368 (1982).

CONCLUSIONS

The N.J. Supreme Court favors "a single and complete review" which avoids *Panitch* and its acceptance of *Liteky* and *Alexander,* which calls for immediate review of disqualification issues. Moreover, the denial of a recusal motion threatens an irreparable injury that requires leave to provide an adequate remedy. So, the refusal to review the denied recusal motion as required by those authorities supports the inference that the Court's policy is a bad faith guise or unusual circumstances which circumvents its constitutional duty to insure an impartial judge in the first instance as an inferior court.[23]

Presently, a biased judge can deny a recusal motion knowing that he has until trials end to shape an outcome to justify the institutional bias against retrial. Therefore, the right to deny leave shows this state's policy is inadequate and a denial of treatment equal to that provided by other jurisdictions, which allow prohibition and mandamus without the need for leave.

For all of the above stated reasons petitioner prays for this Court's consideration of his petition.

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[23] "By this doctrine all other courts in this country are, in effect, reduced largely to the role of automations, directed by us to apply mechanistically all then-settled federal constitutional concepts to every case before them." *Mackey v. U.S.*, 401 U.S. 667 (1971).

A

Nelson & Joan Fernandes,	SUPREME CT of NJ
Plaintiff-Movants	Sept. Term 2002
v.	53,852
Sparta Township ,	ORDER
Defendants-Respondants.	**Fileed 1/15/03**

This matter having been duly presented to the Court, it is ORDERED that the motion for leave to appeal is denied, and it is further

ORDERED that the motion for a stay pending appeal is denied; and it is further

ORDERED that the motion for leave to file a reply brief is denied; and it is further

ORDERED that the motion to strike the respondent's brief and appendix is denied.

WITNESS, the Honorable Deborah T. Poritz, Chief Justice at Trenton, this 14 th. Day of January, 2003.

"S/Stephen Townsend"

Clerk of the Supreme Court

B

Nelson Fernandes, ,
v.
Sparta Township ,

Superior Court of NJ
Appellate Division
Doc. # AM – 115 – 02T1
Motion # M-799-02
Filed Nov. 4, 2002

ORDERED

This matter having been duly presented to the Court, it is on this 30 th. Day of Oct, 2002, hereby ordered as follows;

The motion for leave to appeal and stay is denied.

.

For the Court;

"S/Ariel A. Rodrguez J.A.D."

C

LADDEY,CLARK & RYAN
60 BLUE HERON ROAD
SPARTA, NEW JERSEY 07871-2600
(973) 729-1880

	:	TAX COURT OF N.J.
Nelson & Joan Fernandes,	:	
Plaintiff,	:	**Docket No. 002905-2002**
v.	:	
Sparta Township,	:	ORDER
Defendant.	:	FILED ON Sept. 17, 2002
	:	

THIS MATTER having been opened to the Court by Nelson and Joan Fernandes, Plaintiffs. seeking a stay of these proceedings pending appeal, change of venue, disqualification of Mr. Laddey and his firm from representing Defendant, Township of Sparta, and recusal of the Honorable Harold A. Kuskin, and Laddey, Clark & Ryan, by Brian M. Laddey, Esq., submitting opposition to the motion; the Court having considered the papers submitted in support of and in opposition to the motion;

IT IS on this 17 day of September, 2002, for the reasons set forth in this Court's letter opinion dated September 3, 2002, **ORDERED:**

1. That plaintiffs' motion for stay of these proceedings pending appeal is denied.
2. Plaintiffs Motion for change of venue is denied.
3. Plaintiff's Motion seeking the disqualification of Mr. Laddey and his firm as attorneys for Defendant, Township of Sparta, is denied.
4. Plaintiffs Motion seeking the recusal of the Honorable Harold A. Kuskin is denied.
5. That a copy of this Order shall be served upon all parties within seven (7) days of its receipt by counsel for defendant.

"S/ Harold A. Kuskin, J.T.C."

D

LADDEY,CLARK & RYAN
60 BLUE HERON ROAD
SPARTA, NEW JERSEY 07871-2600
(973) 729-1880

	:	TAX COURT OF N.J.
Nelson & Joan Fernandes,	:	
Plaintiff,	:	**Docket No. 002905-2002**
v.	:	
Sparta Township,	:	ORDER
Defendant.	:	FILED ON Aug. 14, 2002
	:	

THIS MATTER having been opened to the Court by Nelson and Joan Fernandes, plaintiffs, seeking reconsideration of the denial of plaintiffs' motion for an Order requiring the Township of Sparta to file an Answer to the Complaint, including specific answers to the allegations contained in the Rider to the Complaint, and to quash the interrogatories previously served by Laddey, Clark & Ryan, attorneys for defendant, and Laddey, Clark & Ryan, by Brian M. Laddey, Esq., submitting opposition to the motion; the Court having considered the papers submitted in support of and in opposition to the motion:

IT IS on this 14 th. day of August, 2002, for the reasons set forth in this
Court's letter opinion dated August 2, 2002, **ORDERED:**

1. That plaintiffs' motion for reconsideration is denied in its entirety;
2. That the rulings set forth in the Court's July 16, 2002 letter opinion and reflected in the Court's July 30, 2002 Order are correct;
3. That a copy of this Order shall be served upon all parties within seven (7) days of its receipt by counsel for defendant.

"S/ Harold A. Kuskin, J.T.C."

E

LADDEY,CLARK & RYAN
60 BLUE HERON ROAD
SPARTA, NEW JERSEY 07871-2600
(973) 729-1880

	:	TAX COURT OF N.J.
Nelson & Joan Fernandes,	:	
Plaintiff,	:	**Docket No. 002905-2002**
v.	:	
Sparta Township,	:	ORDER
Defendant.	:	FILED ON Aug. 14, 2002
	:	

THIS MATTER having been opened to the Court by Nelson and Joan Fernandes, plaintiffs, seeking a motion to require the Township of Sparta to file an Answer to the Complaint, including specific answers to the allegations contained in the Rider to the Complaint, and to quash the interrogatories previously served by Laddey, Clark & Ryan, attorneys for defendant, Brian M. Laddey, Esq., submitting opposition to the motion; the Court having considered the papers submitted in support of and in opposition to the motion;

IT IS on this 30 th. day of July, 2002 for the reasons set forth in this court's letter opinion dated July 16, 2002,
ORDERED:

1. That plaintiffs' motion to require defendant to file an answer is denied;

2. That plaintiffs' motion to quash defendant's interrogatories is denied;

3. That the time period for plaintiffs to answer defendant's interrogatories shall be as specified by the rules of the court;

4. That plaintiffs shall pay an additional filing fee of $140.00 to the Tax Court Management Office in Trenton by July 31, 2002;

5. That when payment of the additional fee is made, plaintiffs shall send a letter to the Honorable Harold A. Kuskin, J.T.C., reflecting the payment with a copy to Mr. Brian M. Laddey, Esq.;

6. That in the event plaintiffs do not make payment by July 31, 2002, defendants can file a motion to dismiss the Complaint;

7. That a copy of this Order shall be served upon all parties within seven (7) days of its receipt by counsel for defendant.

"S/ Harold A. Kuskin, J.T.C."

F

HAROLD A. KUSKIN Judge
77 HEADQUARTERS PLAZA
1 ST FLOOR, NORTH TOWER
MORRISTOWN, NEW JERSEY 07960-3964
(973) 631-6400

September 3, 2002

N. FERNANDES, PRO SE
9 Fox Run
Denville, NJ 07834

BRIAN M. LADDEY, ESQ.
60 Blue Heron Road
Sparta, NJ 07871-2600

RE: Nelson & Joan Fernandes
v.Township of Sparta
Docket No. 002905-2002

Dear Mr. Fernandes and Mr. Laddey:

This letter constitutes the court's opinion and decision with respect to the motion filed by Mr. Fernandes seeking:

1.a stay of these proceedings pending appeal;
2.a change of venue;
3.the disqualification of Mr. Laddey as attorney for defendant; and
4.my recusal of myself from this matter.

For the reasons set forth below, I deny the motion in all respects.

Mr. Fernandes moves for a stay on the grounds that he has suffered irreparable injury as a result of this court's failure to require the defendant to file an answer in this matter. As explained in my letter opinions of July 16, 2002 and August 2. 2002, under the Court Rules, a municipality is not required to file an answer in a local property tax appeal. Mr. Fernandes erroneously construes the Rule to apply only to small claims matters. The failure of the defendant to file an answer does not in any way impair or prejudice the ability of Mr. Fernandes to determine defendant's contentions and the factual bases for those contentions. The Rules permit interrogatories and other methods of discovery which provide a more than adequate mechanism for Mr. Fernandes to obtain from the municipality a statement of,

and factual support for, its defenses to the various arguments advanced by him.

Based on the preceding analysis, I conclude that, not only did I correctly construe the Rule as not requiring an answer in these proceedings, but also my ruling did not cause any irreparable injury to Mr. Femandes nor will it prejudice his rights to prosecute this appeal or his rights before the Appellate Division.

Mr. Femandes' applications for change of venue, to disqualify Mr. Laddey, and for my recusal are interrelated. They appear to be based on a contention by Mr. Fernandes that the court is biased and that Mr. Laddey has "created the appearance of impropriety." Mr. Laddey has done nothing more than represent his client properly in seeking an interpretation of the Court Rules favorable to his client. Mr. Fernandes argues that the court has displayed bias by ruling in favor of the defendant with respect to the motions which he has filed. There is no foundation for this contention. The rulings which I made are set forth in my letter opinions of July 16, 2002 and August 2, 2002. I continue to believe that those rulings are proper and in accordance with applicable Court Rules and law.

Specifically, Mr. Femandes contends that I treated his appeal as a small claims case to eliminate the need for filing an answer by defendant and treated his appeal as a "state case" to permit Mr. Laddey to serve Standard Form Interrogatories. As previously discussed in my letter opinion of August 2, 2002, I did not conclude that the subject appeal is a "state case" or a small claims matter. I treated the subject appeal as a regular local property tax appeal which is distinguished in the Rules from a state tax case and from small claims cases. I applied the Rules as applicable to regular local property tax appeals.

Mr. Femandes seems particularly incensed by paragraph 3 which was included by Mr. Laddey in the Order he prepared reflecting my rulings of July 16, 2002. As originally submitted, that paragraph read as follows: "that plaintiffs shall answer defendant's interrogatories within the time specified by the Rules of Court." I modified the paragraph to read: "that the time period for plaintiffs to answer defendant's interrogatories shall be as specified by the Rules of Court." There is nothing inappropriate

about this paragraph because it simply requires Mr. Fernandes to comply with the Court Rules. I find no basis for his contention that this paragraph was improper, that it unduly prejudiced him, or that it reflected bias or some impropriety by me or by Mr. Laddey.

The recusal of a trial court judge is governed by Court Rule 1:12-1 which sets forth the bases for recusal, including the following: "(d) [the judge] has given an opinion upon a matter in question; or. . . (f) when there is any other reason which might preclude a fair and unbiased hearing and judgment, or which might reasonably lead counsel or the parties to believe so." The standards for application of this Rule were discussed recently by the New Jersey Supreme Court in State v. Marshall, 148 N.J. 89 (1997), where the Court held as follows:

> The disqualification decision is initially left to the discretion of the trial court. Moreover, judges are not free to err on the side of caution; it is improper for a court to recuse itself unless the factual bases for its disqualification are shown by the movant to be true or are already known by the court.
>
> "Fundamental to any consideration or possible judicial disqualification is a showing of prejudice or potential bias." An adverse ruling in prior proceedings does not warrant disqualification.
>
> An error by the court in the previous proceeding does not necessarily justify an inference of bias and will not, by itself, furnish a ground for disqualification. Of course, art error might be sufficiently blatant, and so lacking in an alternative, good faith explanation that the error would support a charge of bias. In the ordinary case, however, the fact that a court is overruled or overrules its own prior ruling is entitled to no weight in deciding whether that court is biased against the party harmed by the error.
>
> [Id. at 275-77 (citations omitted).]

I have reviewed carefully the prior proceedings in this matter and the letter opinions I have issued. I find nothing in those proceedings or in the opinions to evidence bias on my part or any impropriety on the part of Mr. Laddey. As set forth above, I believe my rulings have been correct to date. Mr. Fernandes retains the right to seek an Appellate Division reversal of those rulings. If the Appellate Division should have a different view of the applicable rules and law, I will abide by their decision. However, Mr. Fernandes has presented nothing which would provide a sufficient basis for granting his applications for a change of venue, a disqualification of Mr. Laddey and his law firm, or my recusal.

Mr. Laddey is directed to submit a form of Order reflecting the rulings contained in this letter. The Order should be submitted pursuant to Court Rule 4:42-1(c). Under that Rule, Mr. Fernandes will have five (5) days after the Order is submitted within which to advise the court of any objections he has to the form of the Order.

Very truly yours,
"S/ Harold A. Kuskin"

G

HAROLD A. KUSKIN Judge
77 HEADQUARTERS PLAZA
1 ST FLOOR, NORTH TOWER
MORRISTOWN, NEW JERSEY 07960-3964
(973) 631-6400

July 16, 2002

N. FERNANDES, PRO SE
9 Fox Run
Denville, NJ 07834

BRIAN M. LADDEY, ESQ.
60 Blue Heron Road
Sparta, NJ 07871-2600

RE: Nelson & Joan Fernandes
v.Township of Sparta
Docket No. 002905-2002

Dear Mr. Fernandes and Mr. Laddey:

This letter constitutes the court's decision with respect to the motion filed by Mr. Fernandes. The motion seeks to require defendant. Township of Sparta, to file an Answer to the Complaint, including specific answers to the allegations contained in the Rider to the Complaint, and seeks to quash the interrogatories previously served by defendant.

The property in question is designated on the Sparta Township Tax Map as Block 149, Lot 1 and is commonly known as 100 Indian Trail. The property is designated on the Regular Assessment Information Schedule attached to the Complaint as "Vacant Land." It appears from the submissions by Mr. Fernandes in support of his motion that the property is zoned for residential development. It further appears that, in connection with the filing of the Complaint, the filing fee paid was $35 which is the fee for a small claims filing. The defendant has not filed an Answer to the Complaint and has served the Standard

Form Interrogatories contemplated by Court Rule 8:6-1(a)(5).

I address first the application by Mr. Fernandes to require the defendant to file an Answer. **Court Rule 8:3-2 provides that "[e]very defendant may but need not file an answer" except in non-small claims State tax cases.** Notwithstanding the lengthy allegations contained in the Complaint filed by Mr. Fernandes, **I see no reason to disregard the provisions of this Rule and require defendant to file an answer.** Whether the defendant admits or denies the various allegations of the Complaint can be determined through interrogatories or other discovery proceedings. An answer is not essential. Accordingly, I deny plaintiffs motion to require defendant to file an answer.

With respect to discovery, the motion to quash the interrogatories is premised upon the filing of the Complaint as a small claims complaint and the payment of a small claims fee. Court Rule 8:11 defines the jurisdiction of the small claims division with respect to local property tax matters as follows: "The small claims division will hear all local property tax cases in which the property at issue is a class 2 property (1-4 family residence) or a class 3A farm residence." As set forth above, the Information Schedule attached to the Complaint in this matter designates the subject property as vacant land. The submissions by Mr. Fernandes also describe the property as vacant land although encumbered by a water well now or previously used by the municipality. Based on these considerations, **I conclude that the Complaint does not qualify as a small claims complaint. As a consequence of that conclusion, the Standard Form Interrogatories served by defendant are proper and must be answered by Mr. Fernandes. Accordingly, I deny the motion to quash the interrogatories.**

A second consequence of my conclusion that this is not a small claims matter is that Mr. Fernandes must pay an additional filing fee. Under Court Rule 8:12(a), the filing fee for a regular appeal is $175. That filing fee has very recently been increased to $200. However, because the Complaint in this matter was filed on May 30, 2002, before the fee increase went into effect and because the additional fee should have been imposed on Mr. Fernandes at the time of filing, I will require only that an additional fee of $140 be paid to the Tax Court in order to prosecute this appeal. Mr. Fernandes shall have until July 31, 2002 within which to make payment of the additional $140 to the Tax Court Management Office in Trenton. When the payment is made, a letter should be sent to me reflecting the payment with a copy to Mr. Laddey. If the payment is not made by July 31, 2002, I will entertain a motion to dismiss the Complaint.

Mr. Laddey is hereby instructed to prepare a form of Order reflecting the rulings contained in this letter. The Order should be submitted promptly pursuant to the provisions of Court Rule 4:42-1(c). Under that Rule, Mr. Fernandes will have five days after the Order is submitted within which to advise the Court of any objections he has to the form of the Order.

Very truly yours,
"S/Harold A. Kuskin, J.T.C."

H

HAROLD A. KUSKIN Judge
77 HEADQUARTERS PLAZA
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MORRISTOWN, NEW JERSEY 07960-3964
(973) 631-6400

August 2, 2002

N. FERNANDES, PRO SE
9 Fox Run
Denville, NJ 07834

BRIAN M. LADDEY, ESQ.
60 Blue Heron Road
Sparta, NJ 07871-2600

RE: Nelson & Joan Fernandes
v.Township of Sparta
Docket No. 002905-2002

Dear Mr. Fernandes and Mr. Laddey:

This letter constitutes the court's decision with respect to the motion filed by Mr. Fernandes seeking reconsideration of the rulings set forth in my letter of July 16, 2002 and reflected in an Order which I entered on July 30, 2002. In that Order, I denied the motion filed by Mr. Fernandes seeking to require defendant to file an Answer, denied his motion to quash the defendant's interrogatories, mid held that this matter does not qualify as a small claims matter under the applicable rules and, therefore, an additional filing fee of $140 was required to be paid.

In his motion for reconsideration, Mr. Fernandes argues that the Court improperly ruled that this appeal does not qualify as a small claims matter in the absence of a cross-motion by defendant and that the ruling was erroneous on the merits.

The requirements for a motion for reconsideration are set forth in Court Rule 4:49-2 which provides that the motion "shall state with specificity the basis on which it is made, including a statement of the matters or controlling decisions which counsel believes the court has overlooked or as to which it has erred." The application of this Rule was thoroughly considered in D'Atria v. D'Atria, 242 N.J. Super 392 (Ch. Div. 1990), where the court stated as follows:

> Reconsideration is a matter within the sound discretion of the Court, to be exercised in the interest of justice. A litigant should not seek reconsideration merely because of dissatisfaction with a decision of the Court. Rather, the preferred course to be followed when one is disappointed with a judicial determination is to seek relief by means of either a motion for leave to appeal or, if the Order is final, by notice of appeal. Reconsideration should be utilized only for those cases which fall into that narrow corridor in which either 1) the Court has expressed its decision based upon a palpably incorrect or irrational basis, or 2) it is obvious that the Court either did not consider, or failed to appreciate the significance of, probative, competent evidence. Said another way, a litigant must initially demonstrate that the Court acted in an arbitrary, capricious, or unreasonable manner, before the Court should engage in the actual reconsideration process."

[Id. at 401 (citations omitted)

I conclude that Mr. Fernandes has failed to demonstrate that I acted in an arbitrary, capricious or unreasonable manner in reaching the decisions contained in my July 16, 2002 letter, nor has he cited any matters or

controlling decisions which I overlooked or as to which I erred. Consequently, the motion for reconsideration is denied.

Even if I were to reconsider my rulings, I would not change them. With respect to my ruling on small claims jurisdiction in the absence of a cross-motion, I reject Mr. Fernandes' position. As explained in my Opinion of July 16, 2002, Court Rule 8:11 defines the jurisdiction of the small claims division. Because the Information Schedule attached to the Complaint filed by Mr. Femandes indicated that the property under appeal was vacant land, the Tax Court Management Office should have refused to file the Complaint in the absence of the payment of a full filing fee of $175. The court retains the inherent authority to impose that fee on its own motion, even in the absence of a formal application made by the defendant.

With respect to the merits of whether the Complaint qualifies as a small claims matter, the argument advanced by Mr. Fernandes ignores the distinction clearly made by the Rules between state tax matters and local property tax matters. Thus, Mr. Femandes cites e 8:3-2 which requires a complaint and an answer in "state tax cases" but, as discussed in my July 16, 2002 letter, provides that "defendant may but need not file an answer" in other matters. Similarly, K. 8:3-4(c)(l) refers to "state tax cases," while Item (2) of the Rule refers to local property tax cases. Rule. 8:4-3(b) refers to state tax cases. Rule. 8:11 provides that small claims jurisdiction includes "all state tax cases in which the amount of refund claimed or additional taxes sought to be set aside with respect to any year for which the

amount in controversy as alleged in the complaint does not exceed the sum of $2,000 exclusive of interest and penalties." This Rule also provides that "all local property tax cases in which the property at issue is class 2 property (1-4 family residence) or a class 3A farm residence" may be heard in the small claims division.

State tax cases involve issues relating to taxes imposed by the State of New Jersey such as the Gross Income Tax, Sales and Use Tax, and Corporation Business Tax. Local property tax matters involve appeals of assessments imposed by municipalities. This matter is a local property tax appeal involving vacant land. It does not qualify for hearing in the small claims division. Accordingly, no answer need be filed, the interrogatories served by defendant are permitted by the Rules, and the filing fee is $175.

Mr. Laddey is hereby directed to submit a form of Order reflecting the rulings contained in this Opinion. The Order should be submitted under the five day Rule as was done in connection with the previous Order. Upon entry of that Order, I will forward to the Tax Court Management Office the $140 check which I received from Mr. Fernandes.

Very truly yours,

"S/Harold A. Kuskin, J.T.C."

I

LEGAL ARGUMENT

POINT I

DEFENDANT HAS COMPLIED WITH THE RULES OF COURT, THUS THE COURT SHOULD DENY PLAINTIFFS' MOTION.

Defendant is not required to file an answer to plaintiffs' complaint. Rule 8.3-2 provides that a defendant "may but need not file an answer" Defendant has chosen not to file an answer.

Defendant is entitled to discovery pursuant to Rule 8:6-1. Rule 8:6-1(a)(5) provides that:

> "In local property tax cases, interrogatories and requests for production of documents shall be in the form and manner prescribed by the Tax Court"

This case has not been assigned to the Small Claims Division. Defendant has REQUESTED Answers to the Form interrogatories as prescribed by the State Tax Court of New Jersey.

For the foregoing reasons it is respectfully submitted that plaintiffs' motion be denied.

7/3/02 "S/Brian M. Laddey"

J

LADDEY,CLARK & RYAN
60 BLUE HERON ROAD
SPARTA, NEW JERSEY 07871-2600
(973) 729-1880

July 10, 2002

Honorable Harold A. Kuskin, J.T.C.
TAX COURT OF NEW JERSEY
North Tower, 1st Floor
77 Headqarters Plaza
Morristown, New Jersey 07963-0910

Re: Fernandes v. Township of Sparta Docket No. 002905-2002

Dear Judge Kuskin:

Please accept this Letter in lieu of a more formal brief on behalf of Sparta Township in opposition to the motion filed by Nelson and Joan Fernandes (hereafter "plaintiffs").

Despite plaintiffs contentions to the contrary, I did not receive anything from which I could have concluded that plaintiffs paid $35.00 to file this matter as Small Claims Action. Attached as exhibit 1 is plaintiffs' Real Property Tax Rcguiar Assessment information Schedule. That document provides at #11:

> "In order to proceed in the Small Claims Division, the property at issue must be a class 2 property (1-4 family residence) _____ or class 3A farm residence. _____ (CHECK ONE)"

As you can see from the attached exhibit 1, plaintiff has checked neither.

Plaintiffs' filing alone is not dispositive of whether this matter is a small claims controversy. Small claims jurisdiction is based on the character of the property, namely a one to four family residence or a class 3A farm residence.

R. 8:11. Plaintiffs' property is a vacant lot and is not within the definition of this Court's small claims jurisdiction.

Although the Court retains the discretion to retain or transfer this matter, given the nature of the allegations raised by plaintiffs, I respectfully submit that proper resolution of this matter requires transfer to the general calendar.

Very truly yours,

"S/Brian M. Laddey"

"illustrates the potential for future mischief". Dickerson v. U.S., No. 99-5525 (U.S. 06/26/2000). So, his refusal **"to acknowledge a disqualifying predisposition or circumstance"** requires **"an appellate court must order recusal no matter what the source."** Liteky v. U.S., 510 U.S. 540, 563. A refusal to disqualify the judge would subject appellant to further irreparable injury or mischief. So, appellant **"ought not have to face a judge where there is reasonable question of impartiality"** since "an impartial judge is a basic due process requirement." [48] When the Panitch court accepted this holding, it was accepting the need for interlocutory appeals. [49]

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[48] "An impartial Judge is a basic due process requirement." Alexander v. Primerica Hldg., Inc., 10 F.3d 155 (3d Cir. 1993).

[49] The instruction to which we adhere **"is designed to promote public confidence in the impartiality of the judicial process by saying, in effect, if there is a reasonable factual basis for doubting the Judge's impartiality, he should disqualify himself and let another Judge preside over the case.". . . . Disqualification for lack of impartiality must have a reasonable basis. . . . Litigants ought not have to face a Judge where there is a reasonable question of impartiality . . . the failure to disqualify was an abuse of sound judicial discretion."** Id. . . **Virtually every court of appeals has recognized the necessity and propriety of interlocutory review of disqualification issues . . ." to ensure that Judges do not adjudicate cases that they have no statutory power to hear." . . "While review after final judgment can (at a cost) cure the harm to a litigant, it cannot cure the additional, separable**

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III – Irreparable Injury

If this Court determines the foregoing warrants leave, then denies the motion based on the judicial policy that favors "uninterrupted proceedings", it will cause an irreparable injury. R.2:2-2(b). The rules of this Court provide a "procedural framework designed and purposed for the just and expeditious determination in a single action of the ultimate merits of an entire controversy."[50] So, denying appellant leave knowing that is facing a judge that he strongly believes to be extremely biased,[51] with this Court knowing his conduct warranted an appeal would be an

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harm to public confidence that section 455 is designed to prevent." . . . we have supervisory authority to order this case reassigned to another district court Judge . . . "impartiality and the appearance of impartiality in a judicial officer are the sine quo non of the American legal system'" . . Because "Justice must satisfy the appearance of Justice," . . **it is our responsibility to exercise our supervisory authority**, as reluctant as we always are to do so when it requires the reassignment of a case. Alexander v. Primerica Holdings, Inc., 10 F.3d 155, 162 (3d Cir. 1993).

[50] "Our rules of court provide a simple and flexible procedural framework designed and purposed for the **just and expeditious determination in a single action of the ultimate merits of an entire controversy between litigants**. Schlossberg v. J.C. Sewer. Auth., 15 N.J. 360, 369-70 (N.J. 1954).

[51] **"Litigants ought not have to face a judge where there is reasonable question of impartiality..."** Panitch v. Panitch, 339 N.J.Super. 63 (A.D. 04/05/2001).

irreparable injury of both rights, which cannot be cured by a post trial appeal. Denying appellant's right to disqualify a biased judge sitting on his trial would violate due process and equal protection, since the U.S. Supreme Court has recognized this to be the accepted procedure of this state.[52]

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[52] "The right to a fair trial would be protected by the New Jersey rule that **permits a defendant to disqualify a particular judge from participating in his case. See New Jersey Court Rules 1:12-1** to 1:12-3 . . **disqualification is mandatory whenever there is any reason "which might preclude a fair and unbiased hearing and judgment, or which might reasonably lead counsel or the parties to believe so." Rules 1:12-1 (e) and (f). . If, because of such disqualifications, the Supreme Court were deprived of the requisite five-member quorum, temporary assignment of substitute Justices is authorized by the New Jersey Court Rules. Rule 2:13-2.** Kugler v. Helfant, 421 U.S. 117 (1975).

II – Denial of the Recusal Motion Warrants Leave

Summary of Argument

The judge was not candid in his opinion on disqualification. This lack of candor constitutes a refusal to acknowledge a **"disqualifying predisposition or circumstance"** that requires **"an appellate court must order recusal no matter what the source."**

Standard of Review

Panitch v. Panitch is the appropriate standard of review. [45] Moreover, appellant has satisfied that portion of its holdings which states; "the belief that the proceedings were unfair must be objectively reasonable".

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[45] "It is improper for a judge to withdraw from a case upon a mere suggestion that he is disqualified **"unless the alleged cause of recusal is known by him to exist or is shown to be true in fact."** Hundred East Credit Corp. v. Eric Schuster, 212 N.J. Super. 350, 358 (App. Div.), certif. denied, 107 N.J. 60 (1986). The challenged judge who hears the motion should clearly set forth the "objective and subjective bases for the ultimate decision." Magill, supra (238 N.J. Super. at 65). In construing the analogous federal statute on judicial disqualification, Justice Kennedy stated in a concurring opinion that **"[i]f through obduracy, honest mistake, or simple inability to attain self knowledge the judge fails to acknowledge a disqualifying predisposition or circumstance, an appellate court must order recusal no matter what the source."** Liteky v. U.S., 510 U.S. 540, 563, 114 S. Ct. 1147, 1161, 127 L. Ed. 2d 474, 495-496 (1994) (Kennedy, J., concurring). "Litigants ought not have to face a judge where there is reasonable question of impartiality..." Alexander v. Primerica Holdings, Inc., 10 F.3d 155, 162 (3d Cir. 1993). It is unnecessary to prove actual prejudice on the part of the court, but rather "the mere appearance of bias may require disqualification.... However, before the court may be disqualified on the ground of an appearance of bias, the belief that the proceedings were unfair must be objectively reasonable." State v. Marshall, 148 N.J. 89, 279, cert. denied, 522 U.S. 850 (1997)." Panitch v. Panitch, 339 N.J.Super. 63 (A.D.. 04/05/2001).

AD – Page 7 of Respondent's Brief to the NJ Sup. Ct.

LEGAL ARGUMENT

POINT I.

THE FERNANDES' MOTION FOR LEAVE TO APPEAL MUST BE DENIED

> "Interlocutory appellate review runs counter to the judicial policy that favors an "uninterrupted proceeding at the trial level with a single and complete review." Moreover, the grant of leave to appeal an interlocutory order is itself highly discretionary, R. 2:2-4; it is customarily exercised only sparingly and its denial by the Appellate Court will not prejudice its further review in the event it is presented in a later appeal."

State v. Reldan, 100 N.J. 187! 205 (1985), quoting In Re: Pennsylvania R.R., 20 N.J. 398, 404 (1956). Additionally the Court in State v. Alfano, 305 N.J.Super. 178, 190 stated leave to appeal is "'highly discretionary'! extraordinary relief" and granted only 'to consider a fundamental claim which could infect a trial and would otherwise be irremediable in the ordinary course'". Citations Omitted. See also, Golden Estates v. Continental CAS, 317 N.J.Super. 82! 88 (App. Div. 1998).

Rule 2:2-2(b) requires that granting leave to appeal must be "necessary to prevent irreparable injury''. This high-standard "expresses the immediacy and urgency which justify prompt Supreme Court review." Pressler, N.J. Court Rules, comment R. 2:2-2(b); (Gann 2003). The Fernandes have not presented the Court with any evidence or argument that establishes this Court's need for immediate and urgent intervention.